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U.S. Anti-Money Laundering Legislation

*David R. Sahr and Daniel Morales**

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I. Introduction

The tragic events of September 11 gave new impetus to anti-money laundering initiatives in the U.S. Congress. Prior to September 11, the efforts by the Clinton Administration to give the Secretary of the Department of the Treasury (Secretary) enhanced authority had not succeeded. Rather than pursuing additional legislative initiatives, the Bush Administration was emphasizing the priority of enhanced enforcement of existing laws. The privacy concerns that had defeated earlier anti-money laundering initiatives, most notably the "know your customer" regulations, continued to discourage the advance of new anti-money laundering initiatives.

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The United States political agenda changed after September 11. New anti-money laundering legislation rapidly became a popular vehicle to fight the funding mechanisms upon which terrorists rely. As a result, on October 25, 2001, the most significant package of anti-money laundering measures in more than a decade was passed by Congress and signed into law by the President the next day. The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, was enacted as title III of the broad anti-terrorism legislation, entitled *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA Patriot Act).¹

A. OVERVIEW

The USA Patriot Act is an amalgam of various pre-September 11 initiatives combined with a few additional provisions specifically included to enhance the war on terrorism. The main themes of the Act are: (i) enhancing anti-money laundering controls on transactions between domestic financial institutions and foreign institutions and persons, and (ii) strengthening the powers of U.S. law enforcement vis-à-vis foreign-related transactions. By expanding U.S. anti-money laundering laws, the USA Patriot Act also aligns them more closely with international standards in certain, but not all, respects.² Highlights of the Act that are of most importance with regard to financial institutions include:

- Establishing minimum standards for U.S. financial institutions to prevent money laundering by non-U.S. persons through private banking and correspondent banking accounts and prohibiting correspondent banking services for foreign shell banks;

1. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). Title III will terminate on or after September 30, 2004, if Congress enacts a joint resolution to terminate the Act. *See id.* §303.
2. The Financial Action Task Force on Money Laundering (FATF) evaluates its member countries based on national compliance with FATF's Forty Recommendations, the internationally recognized standards for an effective anti-money laundering regime. *See FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS*, available at http://www.fatf-gafi.org/pdf/40Rec_en.pdf (last visited Sept. 23, 2002) [hereinafter *THE FORTY RECOMMENDATIONS*]. According to FATF's annual report for 2000–2001, the United States was not in full compliance with eleven of the twenty-eight recommendations and ranked twenty-sixth out of twenty-nine Member Countries. The report states:

[The United States] is in partial compliance with [Recommendations] 8, 10-12, 14, 15, 19-20, 26 and 29 due to the fact that it has not extended necessary anti-money laundering measures to insurance companies. Additionally with regard to [Recommendations] 14, 15, 28 and 29, the United States has not yet imposed all necessary obligations on bureaux de change and money transmitters (in particular concerning suspicious activity reporting).

FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, *ANNUAL REPORT 2000–2001*, annex D, at 5–6 (June 22, 2001) [hereinafter *Annual Report 2000–2001*].

- Requiring the Secretary to adopt regulations subjecting securities broker-dealers registered with the Securities and Exchange Commission (SEC) to the requirement of filing suspicious activity reports and providing authority to the Secretary to extend such requirements to futures commission merchants and other commodities firms;
- Expanding the types of financial institutions subject to the Bank Secrecy Act (BSA) to include credit unions, futures commission merchants, commodity trading advisors and commodity pool operators;
- Requiring financial institutions to implement anti-money laundering procedures and to provide records concerning anti-money laundering compliance within 120 hours of receiving a request from regulatory authorities;
- Broad authority for the Secretary to identify foreign jurisdictions, financial institutions, and transactions that are of "primary money laundering concern" and to impose special regulatory measures on financial institutions operating in the United States in connection with certain accounts or other relationships involving such jurisdictions, financial institutions and transactions;
- Expansion of the kinds of violations of foreign law, including foreign corruption offenses, that serve as predicate offenses for money laundering violations; and
- Enhanced forfeiture, recordkeeping, and jurisdictional requirements, some of which will have an extraterritorial impact on non-U.S. banks and other persons.

II. New Correspondent Banking Obligations

After the Bank of New York's transactions for Russian banks became public during the summer of 1999,³ correspondent banking for foreign banks has been a focus of attention on Capitol Hill. On September 21–22, 1999, the House Financial Services Committee held hearings on Russian money laundering. The U.S. Senate Permanent Subcommittee on Investigations, under the initiative of the then-ranking member Senator Carl Levin (D-MI), investigated correspondent banking and released a report on February 5, 2001, entitled "Correspondent Banking: A Gateway for Money Laundering."⁴ The report concluded that three types of foreign banks present a high risk of money laundering through U.S. correspondent accounts: shell banks, offshore banks, and banks in jurisdictions with weak anti-money laundering controls. In response to the report, the New York Clearing House Association⁵ proposed a "code of best practices" to provide uniform and

3. See, e.g., Robert O'Harrow Jr. & David S. Hilzenrath, *Executive Fired In Bank Probe: Money-Laundering Inquiry Tries To Track Funds From Russia*, WASHINGTON POST, Aug. 28, 1999, at A1; Eric Schmitt, *Bank's Head Admits 'Lapse' In Money Laundering Case*, NEW YORK TIMES, Sept. 23, 1999, at A8.

4. See MINORITY STAFF OF THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, 107th CONG., REPORT ON CORRESPONDENT BANKING: A GATEWAY FOR MONEY LAUNDERING 5 (Comm. Print 2001).

5. The New York Clearing House is the largest bank clearing house in the United States and a leading bank association. See NEW YORK CLEARING HOUSE, THE CLEARING HOUSE HISTORY, available at <http://www.nych.org/history.htm> (last visited Oct. 8, 2002).

recognized procedures for correspondent accounts with foreign financial institutions.⁶ Subsequently, on August 3, 2001, Senator Levin and others also introduced legislation that, among other things, required enhanced due diligence for foreign correspondent banking in general, and prohibited such services for foreign "shell" banks.⁷

The USA Patriot Act contains many of Senator Levin's proposed initiatives concerning correspondent banking, as well as other provisions taken from prior legislative initiatives. These provisions overlap in certain respects, have different effective dates, and in several areas need to be further defined by regulations to be issued by the Department of the Treasury.

III. Record, Subpoena and Forfeiture Provisions

Section 319 of the USA Patriot Act, which became effective December 25, 2001, is based on recommendations originating in the Justice Department. It requires U.S. correspondent banks to maintain certain records concerning foreign banks that have a U.S. correspondent account. This section also provides authority for the Secretary and the Attorney General to subpoena the foreign bank's offshore records concerning the account, and authorizes forfeiture of deposits in the foreign bank. The purpose is to enhance the powers of U.S. law enforcement authorities to monitor correspondent accounts and seize funds that might otherwise be outside of U.S. jurisdiction.

"Covered financial institutions" maintaining correspondent accounts in the United States for foreign banks are required to maintain records that (i) identify the owners of the foreign bank; and (ii) include the name and address of a person who resides in the United States and is authorized to accept service of process in the United States for the foreign bank relating to the correspondent account. "Correspondent account" is defined as "an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution."⁸

The Department of the Treasury has issued a final rule interpreting the scope of these requirements for banks and securities broker-dealers, including the scope of the requirement to obtain information concerning a foreign bank's owners.⁹ The final rule contains a procedure under which the covered U.S. financial institution requests that the

6. See Letter from the New York Clearing House Association to Senator Levin, the U.S. Senate Permanent Subcommittee on Investigations (Feb. 24, 2001), available at <http://www.nych.org/comment/levin.pdf>.

7. See Money Laundering Abatement Act, S. 1371, 107th Cong. (2001). After the terror attacks of September 11, Senator Levin stated that the trial of terrorists linked to the U.S. Embassy bombings in Africa showed that Osama bin Laden's al Qaeda network was able to funnel \$250,000 to an operative in the United States through a Sudanese bank's correspondent relationship with a Texas bank. See *Money Laundering and Terrorism*, Before the Committee on Banking, Housing and Urban Affairs on Money Laundering and Terrorism, 107th Cong. (2001) (statement of Sen. Levin).

8. USA Patriot Act §311(a).

9. Anti-Money Laundering Requirements—Correspondent Accounts for Foreign Shell Banks; Record keeping and Termination of Correspondent Accounts for Foreign Banks, 67 Fed. Reg. 60,562 (Sept. 26, 2002) (to be codified at 31 C.F.R. part 103) [hereinafter AMLR]. The final

foreign bank certify relevant information concerning its owners as well as the name and address of its agent for service of process. For purposes of the certification, the final rule also clarifies the definition of the term "covered financial institution"¹⁰ and the extent to which the "owners" of a foreign bank are to be identified. Under the final rule, an owner is any person who, directly or indirectly: (i) owns, controls or has power to vote 25 percent or more of any class of voting securities or other voting interests of a foreign bank; or (ii) controls in any manner the election of a majority of the directors (or other individuals exercising similar functions) of a foreign bank.¹¹ Holdings by members of the same family are treated as though they are held by a single person.¹² There is an exception for owners of publicly traded companies.

Section 319 of the USA Patriot Act also authorizes the Secretary and the Attorney General to issue a subpoena to a foreign bank to request records related to the correspondent account, including records that are maintained outside of the United States relating to the deposit of funds in the foreign bank. If the foreign bank fails to provide the information, the Secretary or the Attorney General may require a domestic financial institution to terminate its correspondent bank account with that foreign bank.¹³ Requesting records from outside the United States would have an extraterritorial impact and may conflict with applicable foreign laws prohibiting such disclosure, in particular if the identity of a foreign bank's customer is requested. Such an extraterritorial impact could be avoided if the United States requests disclosure of records from a foreign party through a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance.

If a person's funds maintained offshore with a foreign bank would be subject to forfeiture if they had been deposited in the United States, section 319 also authorizes the U.S. government to seize an amount equal to those funds from the foreign bank's U.S. "interbank,"¹⁴ or correspondent account.¹⁵ Even if the funds deposited offshore were

rule replaces the proposed rule that was released on December 28, 2001, 66 Fed. Reg. 67,640 (Dec. 28, 2001). Similarly, the proposed rule supersedes the interim guidance, published November 27, 2001 and which took effect on that date.

10. For the purposes of this provision, a "covered financial institution" means (i) an insured bank; (ii) a commercial bank or trust company; (iii) a private banker; (iv) an agency or branch of a foreign bank in the United States; (v) a credit union; (vi) a thrift institution; or (vii) a broker or dealer registered with the SEC. See 12 U.S.C. §5312(a)(2)(A)-(G) (2002); AMLR at 60,571 (to be codified at 31 C.F.R. §103.175(f)(2)).
 11. AMLR at 60,571 (to be codified at 31 C.F.R. §103.175(l)). The final rule's definition of "owner" replaces a more complex definition that was introduced in the proposed rule.
 12. *Id.*
 13. The Act also provides domestic financial institutions a safe harbor from liability for terminating a U.S. correspondent account of a foreign bank upon the request of the Secretary or the Attorney General based on noncompliance with a subpoena. USA Patriot Act §319(b).
 14. The term "interbank account" means "an account held by one financial institution at another financial institution primarily for the purpose of facilitating customer transactions." 18 U.S.C. §984(c)(2)(B) (2002). The definition is similar to the term "correspondent account" See USA Patriot Act §311(e)(1)(B).
 15. Under pre-existing federal forfeiture law, funds in correspondent bank accounts were considered to belong to the foreign respondent bank, and it was not possible to seize the funds solely on the wrongdoing of one of the bank's depositors. It was also necessary to demonstrate
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never transferred into the U.S. account, they could still be seized because section 319 deems funds deposited abroad in a foreign bank to have been deposited in that institution's correspondent account with a domestic financial institution. The USA Patriot Act permits the owner of the funds to contest the forfeiture by initiating a proceeding in a U.S. court. The provision also provides a mechanism to address the extraterritorial reach of this provision by giving the Attorney General the authority to suspend or terminate a forfeiture if the Attorney General determines that a conflict of law exists between United States and foreign law, the suspension or termination would be just, and would not harm the U.S. national interest.

IV. Foreign Shell Banks

Section 313 of the USA Patriot Act prohibits "covered financial institutions" from maintaining a U.S. correspondent account for a foreign bank that does not have a physical presence in any country (a "foreign shell bank").¹⁶ In addition, a covered financial institution is required to take "reasonable steps" to ensure that a correspondent account for any foreign bank is not being used by that foreign bank to provide banking services indirectly to a foreign shell bank. The Act requires the Secretary to promulgate regulations that delineate the reasonable steps necessary to comply with this requirement. Section 313 became effective December 25, 2001. The USA Patriot Act does not prohibit a covered financial institution from providing a correspondent account to a foreign shell bank that (i) is an affiliate of a depository institution, credit union, or foreign bank that maintains a physical presence in the United States or a foreign country, and (ii) is subject to supervision by the regulator of the affiliated financial institution. The foreign shell bank exception is "intended to be narrowly construed to protect the U.S. financial system from shell banks to the greatest extent possible."¹⁷

In the final rule described above, the Secretary also addresses compliance with this requirement. The final rule suggests that the certification obtained by the foreign bank should state that the foreign bank either is not a shell bank, or is covered by the exemption. The certification also asks the foreign bank to state that it does not provide banking services to such banks through its correspondent accounts.

that the foreign bank holding the deposits was "knowingly engaged" in the laundering of the funds or in other criminal misconduct justifying seizure of the bank's own funds. See 18 U.S.C. §984(c)(1) (2002).

16. The term "physical presence" means "a place of business that (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank (1) employs one or more individuals on a full-time basis; and (2) maintains operating records related to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities." USA Patriot Act §313(4)(B).
 17. See 147 CONG. REC. 10,990, at 11,034 (daily ed. Oct. 25, 2001)(statement of Sen. Levin). Senator Levin also stated that "[t]he intent of this exception is to allow U.S. financial institutions to do business with shell branches of large, established banks on the understanding that the bank regulator of the large, established bank will also supervise the established bank's branch offices worldwide, including any shell branch." *Id.* at 11,034-35.
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V. Special Due Diligence Requirements for Foreign Banks

Section 312 of the USA Patriot Act requires domestic financial institutions¹⁸ to adopt specific due diligence procedures for correspondent accounts for foreign banks, including both new and existing accounts. Such procedures should be "reasonably designed" to detect and report money laundering through those accounts. The Act required the Secretary, in consultation with the appropriate federal regulators of the affected financial institutions, to further define and clarify by regulation the due diligence requirements for correspondent banking by April 24, 2002.¹⁹ The effective date of this provision was July 23, 2002.²⁰ Unlike the recordkeeping requirements discussed above, section 312 is primarily intended to enhance the "know your customer" procedures followed by domestic financial institutions in providing correspondent services to foreign banks.

Section 312 requires additional special due diligence procedures for correspondent accounts with regard to two specific categories of foreign banks: (i) those operating under an offshore banking license,²¹ and (ii) those operating under a license issued by a country that is either designated by the Secretary to be of "primary money laundering concern"²² or that has been designated as non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member (for example, the Financial Action Task Force (FATF)), with which designation the U.S. representative to the group or organization concurs. At a minimum, such additional due diligence policies must ensure that the domestic financial institutions take "reasonable steps" (i) to ascertain, for any such foreign bank the shares

18. The Bank Secrecy Act defines "financial institution" to include an insured bank, a commercial bank or a trust company, a private banker, an agency or branch or agency of a foreign bank, a thrift institution, a broker-dealer registered with the SEC, a broker or dealer in securities or commodities, an investment banker or investment company, an insurance company, and any other entity that is a "financial institution" under the BSA. 31 U.S.C. §5312(a)(2) (2002). Section 321 of the USA Patriot Act expands the definition of the term "financial institution" in the BSA to include credit unions, futures commission merchants, commodity trading advisors, and commodity pool operators registered, or required to be registered, under the Commodity Exchange Act. USA Patriot Act §321.
19. On May 30, 2002, the Department of the Treasury released a proposed rule implementing section 312 of the USA Patriot Act relating to due diligence for correspondent accounts. 67 Fed. Reg. 37,736 (May 30, 2002).
20. On July 23, 2002, the Department of the Treasury released an interim final rule implementing section 312 of the USA Patriot Act, 67 Fed. Reg. 48,348 (July 23, 2002). Under the interim final rule, the requirements of section 312 with respect to due diligence for correspondent accounts was temporarily deferred for all financial institutions other than banks. *Id.* at 48,351. For this purpose, banks include insured banks, commercial banks, thrift institutions, federally insured credit unions, Edge and agreement corporations and U.S. branch and agency offices of foreign banks. *Id.* Banks will be deemed to be in compliance with the interim final rule if they focus their due diligence efforts on accounts that pose a higher risk of money laundering and accounts established after July 23, 2002. *Id.* at 48,350.
21. "Offshore banking license" is defined as a license "to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license." USA Patriot Act §312.
22. See the discussion below in the section "Special Measures."

of which are not publicly traded, the identity of each of the owners of the foreign bank, and the nature and extent of the ownership interest of each owner; (ii) to conduct "enhanced scrutiny" of the account and report any suspicious transactions; and (iii) to ascertain whether any such foreign bank itself provides correspondent accounts to other foreign banks, and, if so, identify those banks and gather related due diligence information.²³

In practice, the USA Patriot Act appears to require that if, as a member of the FATF, the Secretary or some other U.S. official votes in favor of placing a country on the FATF list of non-cooperative jurisdictions, correspondent accounts involving institutions located in such a jurisdiction automatically would be subject to additional due diligence standards.²⁴ The Act is unclear on whether this provision applies when the offshore banking license is held by a branch or subsidiary of a foreign bank that is subject to consolidated supervision by the foreign bank's home country regulator. As discussed above, an exception to the prohibitions in section 313 is provided for a foreign shell bank that is subject to supervision by the regulator of the affiliated financial institution that has a physical presence.

VI. Special Measures Imposed by the Secretary of the Treasury

As discussed below in the section "Special Measures," section 311 of the USA Patriot Act authorizes the Secretary (i) to determine that a foreign jurisdiction, a foreign financial institution, or a class of transactions are of "primary money laundering concern;" and (ii) to impose "special measures" on domestic financial institutions when they are involved with a foreign jurisdiction, foreign financial institution, or class of transaction determined to be of "primary money laundering concern." Section 311 specifically authorizes the Secretary to use this authority with respect to correspondent accounts and payable-through accounts.²⁵ The Secretary may require domestic financial institutions

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23. Senator Levin identified in his Senate floor speech, additional reasonable steps that "would be appropriate before opening or operating accounts for these two categories of foreign banks, including steps to check the foreign bank's past record and local reputation, the jurisdiction's regulatory environment, the bank's major lines of business and client base, and the extent of the foreign bank's anti-money laundering program." 147 Cong. Rec. 10,990, at 11,037 (daily ed. Oct. 25, 2001) (statement of Sen. Levin). See also the specific guidelines for due diligence on correspondent banking provided by the Basel Committee on Banking Supervision, *Customer Due Diligence for Banks*, no. 85, at 12 (Oct. 2001).
 24. See FATF-GAFI, LIST OF CURRENT NON-COOPERATIVE COUNTRIES AND TERRITORIES (Oct. 14, 2002), available at http://www.fatf-gafi.org/NCCT_en.htm (last visited Nov. 27, 2002). FATF's list of NCCTs is comprised of the following jurisdictions: Cook Islands; Egypt; Grenada; Guatemala; Indonesia; Myanmar; Nauru; Nigeria; Philippines; St. Vincent and the Grenadines; and Ukraine. The FATF is currently the only intergovernmental group or organization that has designated countries as non-cooperative.
 25. "Payable through account" is defined as "an account, including a transaction account, opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States." USA Patriot Act §311. The Federal Reserve Board (FRB) has adopted supervisory
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to identify the customers who use these accounts and obtain information concerning them that is substantially comparable to that which is obtained in the ordinary course of business with respect to U.S. customers. The Secretary may also prohibit completely, or impose certain conditions on a domestic financial institution's opening or maintaining any correspondent or payable-through account that involves any designated jurisdiction, financial institution, or class of transactions.

VII. New Private Banking and Customer Due Diligence Obligations

The risk of money laundering through private banking accounts has been a focus of regulatory and Congressional concern for many years. Financial services for wealthy individuals came under particular scrutiny in the aftermath of the 1995 scandal concerning services for Raul Salinas, the brother of the then President of Mexico. The U.S. Senate Permanent Subcommittee on Investigations examined private banking and its vulnerability to money laundering, and issued a report in November 1999 addressing these issues.²⁶ The General Accounting Office has also issued several reports on private banking and money laundering.²⁷ The federal banking regulators have adopted "know your customer" guidelines and other supervisory guidance designated to discourage money laundering in the private banking business, and have begun to examine private banking practices more comprehensively.²⁸ Because of increasing concerns that corrupt foreign political figures could use banks to launder illicit funds, and in response to legislation introduced by Senator Carl Levin and others to require enhanced due diligence for private banking accounts for non-U.S. persons,²⁹ the Treasury Department and U.S. banking regulators issued jointly in January 2001 "Guidance on Enhanced Scrutiny for Transactions that May Involve the Proceeds of Foreign Official Corruption."³⁰ Senator Levin's legislative initiatives are reflected in the Act.

policies that already require banks to monitor payable through accounts closely. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANK SECRECY ACT EXAMINATION MANUAL §1100 (1997).

26. See MINORITY STAFF OF THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, 106th CONG., REPORT ON PRIVATE BANKING AND MONEY LAUNDERING: A CASE STUDY OF OPPORTUNITIES AND VULNERABILITIES 872 (Comm. Print 1999).
 27. See, e.g., United States General Accounting Office, *Money Laundering: Observations on Private Banking and Related Oversight of Selected Offshore Jurisdictions* (GAO-T-GGD-00-32) (Nov. 1999); United States General Accounting Office, *Private Banking: Raul Salinas, Citibank, and Alleged Money Laundering* (GAO/OSI-99-1) (Oct. 1999).
 28. See, e.g., FEDERAL RESERVE BANK OF NEW YORK, SOUND PRACTICES PAPER: PRIVATE BANKING, REPRINTED IN BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANK SECRECY ACT EXAMINATION MANUAL §1301.0 (1997).
 29. See Money Laundering Abatement Act, S. 1371, 107th Cong. (2001).
 30. See Office of Thrift Supervision, DEPARTMENT OF TREASURY & DEPARTMENT OF STATE, GUIDANCE ON ENHANCED SCRUTINY FOR TRANSACTIONS THAT MAY INVOLVE THE PROCEEDS OF FOREIGN OFFICIAL CORRUPTION (2001), available at <http://www.occ.treas.gov/ftp/bulletin/2001-9a.pdf>. (The Senior Political Figure Guidance provides that it is not rule or regulation and should not be interpreted as such).
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Section 312 of the USA Patriot Act generally requires domestic financial institutions to adopt specific due diligence procedures for private banking accounts of non-U.S. persons,³¹ including a foreign individual visiting the United States or a representative of a non-U.S. person. Such procedures are to be "reasonably designed" to detect and report money laundering through those accounts. Section 312 also required the Secretary to further define and clarify by regulation the due diligence requirements for private banking by April 24, 2002.³² The effective date of this provision was July 23, 2002.³³ The provision applies to both new and existing private banking accounts. However, it does not apply to accounts opened by U.S. citizens, unless such accounts are maintained for the benefit of a non-U.S. person.

The due diligence policies must ensure that the institution takes reasonable steps (i) to obtain sufficient information about the identity of the nominal and beneficial owners of, and source of funds deposited into, a private banking account for any foreign person to guard against money laundering and to report any suspicious transaction; and (ii) to conduct "enhanced scrutiny" of any such account that is reasonably designed to detect and report transactions that may involve proceeds of foreign corruption and involves "senior foreign political figures," their immediate families, or their close associates.³⁴ In addition, section 315 adds foreign corrupt offenses to the list of crimes that can trigger a U.S. money laundering prosecution.

31. The term "private banking account" means "an account (or any combination of accounts) that (i) requires a minimum aggregate deposit of funds or other assets of not less than \$1 million; (ii) is established on behalf of one or more individuals who have a direct or beneficial ownership interest in the account; and (iii) is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account." USA Patriot Act §312(a)(i)(4)(B). The term "non-United States person" is not defined in the Act.

32. On May 30, 2002, the Department of the Treasury released a proposed rule implementing section 312 of the USA Patriot Act relating to due diligence requirements for private banking accounts. 67 Fed. Reg. 37,736 (May 30, 2002).

33. On July 23, 2002, the Department of the Treasury released an interim final rule implementing section 312 of the USA Patriot Act, 67 Fed. Reg. 48,348 (July 23, 2002). Under the interim final rule, the requirements of section 312 with respect to due diligence for private banking accounts established or maintained for foreign persons was temporarily deferred for all financial institutions other than banks; brokers or dealers in securities that are, or are required to be, registered with the SEC; or futures commission merchants or introducing brokers registered, or required to be registered, with the CFTC. *Id.* at 48,351-48,352. On July 23, 2002, the Department of the Treasury released an interim final rule implementing section 312 of the USA Patriot Act, 67 Fed. Reg. 48,348 (July 23, 2002). Under the interim final rule, the requirements of section 312 with respect to due diligence for correspondent accounts was temporarily deferred for all financial institutions other than banks. *Id.* at 48,351. For this purpose, banks include insured banks, commercial banks, thrift institutions, federally insured credit unions, Edge and agreement corporations and U.S. branch and agency offices of foreign banks. *Id.* at 48,352. A financial institution's due diligence procedures will be deemed to be reasonable under the interim final rule if they comply with current government guidance relating to private banking accounts such as the FRB's guidance on private banking activities. *Id.* at 48,350 (citing to FRB SR 97-19 (SUP) "Private Banking Activities" (June 30, 1997)).

34. USA Patriot Act §312.

The USA Patriot Act directs the Secretary to issue regulations defining the term "beneficial ownership."³⁵ Senator Levin remarked in his Senate floor speech that these requirements should build on practices already developed in the industry, such as the recent initiative by a major group of international banks, titled the Wolfsberg "Global Anti-Money Laundering Guidelines for Private Banking,"³⁶ which require due diligence to be performed on all principal beneficial owners in accordance with certain listed principles.³⁷ To clarify the scope of the Act's requirements, Senator Levin stated that "[n]o one wants financial institutions to record the names of the stockholders of publicly traded companies. No one wants financial institutions to identify the beneficiaries of widely held mutual funds."³⁸ He also stated that banks must obtain the identity of the beneficial owner in cases where attorneys, trustees, or asset managers direct payments on behalf of unnamed parties into or out of an account.³⁹ Under the "Special Measures" authority described below, the Secretary may impose additional requirements on private banking services relating to foreign jurisdictions, institutions, and transactions of "primary money laundering concern."

Section 326 of the USA Patriot Act requires the Secretary to adopt final regulations within one year from enactment setting forth the minimum standards for verifying the

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35. Issues that must be addressed are "an individual's authority to fund, direct or manage the account . . . , and an individual's material interest in the income or corpus of the account, and shall ensure that the identification of individuals under this section does not extend to any individual whose beneficial interest in the income or corpus of the account is immaterial." *Id.* §311(e)(3). Under the proposed rule implementing section 312 of the USA Patriot Act, a beneficial ownership interest in an account means: (i) a noncontingent legal authority to fund, direct, or manage the account (including, without limitation, the power to direct payments into or out of the account); provided, that a legal authority to fund or to direct payments into an account shall mean a specific contractual or judicial authority to do so; or (ii) a noncontingent legal entitlement to all or any part of the corpus or income of the account, but shall not include any interest of less than the lesser of \$1,000,000 or five percent of either the corpus or income of the account. 67 Fed. Reg. 37,736, 37,742 (May 30, 2002).
 36. See WOLFSBERG GROUP OF BANKS, GLOBAL ANTI-MONEY LAUNDERING GUIDELINES FOR PRIVATE BANKING §1.2.2, available at <http://www.wolfsberg-principles.com/Principles.pdf> (Oct. 2000). The guidelines were sponsored by eleven major international private banking groups, including Chase Manhattan Private Bank, Citibank N.A., Credit Suisse Group, HSBC and UBS AG. The Basel Committee on Banking Supervision also issued guidelines in October 2001 on customer due diligence for banks and requires the identification of the beneficial owner. See *Customer Due Diligence for Banks*, *supra* note 23, at 6–12. In addition, the FATF Forty Recommendations require identification of beneficial owners under certain circumstances. See *THE FORTY RECOMMENDATIONS*, *supra* note 2, at 3.
 37. Switzerland, for example, has had beneficial ownership requirements in place since 1977, which are not limited to foreign persons. Among other things, it requires certain account-holders to sign a specific document declaring the identity of the account's beneficial owner. See *AGREEMENT ON THE SWISS BANK'S CODE OF CONDUCT WITH REGARD TO THE EXERCISE OF DUE DILIGENCE* (5th ed. 1998); Art. 305ter of the Swiss Penal Code, SR 311.0; Arts. 4-5 of the Federal Law on Combating Money Laundering in the Financial Sector, SR 955.0.
 38. See 147 CONG. REC. S11,036 (daily ed. Oct. 25, 2001).
 39. *Id.*
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identity of customers opening an account at a financial institution.⁴⁰ The regulations, which will apply to both foreign and domestic customers, will require financial institutions to implement reasonable procedures for (i) verifying the identity of any person seeking to open an account; (ii) maintaining records of the information used to verify a person's identity, including name, address, and other identifying information; and (iii) consulting applicable lists of known or suspected terrorists or terrorist organizations generated by government agencies to determine whether a person seeking to open an account appears on any such list. In developing the regulations, the Secretary must consider the different types of accounts maintained by various types of financial institutions, the numerous methods of opening accounts, and diverse types of identifying information available. The Secretary may exempt certain types of financial institutions or accounts from these requirements.

Section 325 authorizes, but does not require, the Secretary to prescribe regulations on the maintenance of "concentration accounts" (that is, an account in which a bank commingles funds belonging to more than one customer) to ensure that those accounts are not being used to prevent the association of the identity of an individual customer with the movement of funds. At a minimum, the regulations must (i) prohibit financial institutions from allowing customers to direct transactions that move funds into, out of, or through concentration accounts; (ii) prohibit institutions and their employees from informing customers about the existence of, or the means of identifying, concentration accounts; and (iii) require each financial institution to establish written procedures governing the documentation of all transactions involving a concentration account that ensure that whenever funds are commingled the identity and amount of funds belonging to each customer is documented.

VIII. Securities Broker-Dealers and Other Institutions

Most of the Act's provisions apply generally to all U.S. "financial institutions," not just banks.⁴¹ Thus, securities broker-dealers are subject to the special due diligence

40. On July 23, 2002, the Department of the Treasury released proposed rules outlining the minimum customer identification program requirements for U.S. banks, thrifts and credit unions (including U.S. branches and agencies of foreign banks); securities broker-dealers; mutual funds; introducing brokers; futures commission merchants; and U.S. banks that are not regulated by a federal bank regulatory agency. 67 Fed. Reg. 48,290, 48,299, 48,306, 48,318 and 48,328 (Jul. 23, 2002). Citing substantial issues raised in the comment letters, Treasury on October 11, 2002, issued a press release advising financial institutions that they would not be required to comply with section 326 of the Act until final regulations are issued and become effective. The Basel Committee on Banking Supervision's guidelines on customer due diligence for banks provides, in detail, standards for customer acceptance, identification, on-going monitoring of accounts and transactions, dealing with high-risk accounts, the role of supervisors, and know-your-customer standards in a cross-border context. See *Customer Due Diligence for Banks*, *supra* note 22. In addition, the FATF Forty Recommendations also address customer identification requirements. See *Forty Recommendations*, *supra* note 2, at 3.

41. See Bank Secrecy Act, 31 U.S.C. §5312(a)(2) (2002).

requirements for correspondent and private banking accounts, the foreign shell bank ban, the special measures that the Secretary is authorized to impose, the requirements to establish anti-money laundering programs, and the implementation procedures used to verify the identity of any person seeking to open an account.⁴² Moreover, the Act expands the definition of the term "financial institution" in the BSA to include credit unions, futures commission merchants, commodity trading advisors, and commodity pool operators that are registered, or required to be registered, under the Commodity Exchange Act.⁴³

Before the USA Patriot Act, securities broker-dealers that accepted customer funds were required to comply with various BSA or similar recordkeeping and reporting requirements. Securities broker-dealers subject to these requirements must identify and report currency transactions exceeding \$10,000, report interests in foreign bank and financial institution accounts, and report the transportation of currency or monetary instruments of over \$10,000 into or out of the United States.⁴⁴ However, apart from U.S. broker-dealer subsidiaries of bank holding companies and of foreign banks with U.S. branches and agencies⁴⁵ securities broker-dealers have not been subject to suspicious activity reporting requirements or the "know your customer" and other anti-money laundering requirements imposed by the banking regulators with respect to high risk accounts such as private banking for foreign political figures. The Secretary has had the authority to require securities broker-dealers to submit suspicious activity reports since the passage of the Annunzio-Wiley Anti-Money Laundering Act in 1992 but has never issued such regulations.⁴⁶ Nevertheless, as a matter of best practices, some large broker-dealers voluntarily monitor customer activity and file suspicious activity reports.⁴⁷

To deal with this potential gap in the U.S. anti-money laundering regime, section 356 of the USA Patriot Act required the Secretary, in consultation with the Federal Reserve Board (FRB) and the SEC, to publish proposed regulations by January 1, 2002, that would require all registered securities broker-dealers to file suspicious activity

42. USA Patriot Act §321.

43. *Id.*

44. See Reports of Foreign Financial Accounts, 31 C.F.R. §§103.22–103.24 (2002). The USA Patriot Act also imposes currency transaction reporting requirements on any person engaged in a "non-financial trade or business." USA Patriot Act §365. Under Internal Revenue Service rules, non-financial entities were already required to file currency transaction reports when they engaged in any transaction, or transactions, in the aggregate exceeding \$10,000 by any customer. 26 U.S.C. §6050I (2001). By April 26, 2000 the Secretary must prescribe how such receipts of cash should be reported to the Financial Crimes Enforcement Network (FinCEN).

45. See Corporate Practices, 12 C.F.R. §225.4(f) (2002).

46. See 31 U.S.C. §5318 (2002).

47. In a survey conducted last year, the General Accounting Office found that 17 percent of 3,015 brokerage firms and dealers and 40 percent of mutual-fund groups said they had undertaken voluntary money-laundering controls beyond standard regulatory requirements. See United States General Accounting Office, *Anti-Money Laundering: Efforts in the Securities Industry*, GAO-02-111, at 27–30 (Oct. 2001).

reports.⁴⁸ Final regulations must have been issued by June 1, 2002. The Act also permits the Secretary, in consultation with the Commodity Futures Trading Commission (CFTC), to adopt regulations that require futures commission merchants, commodity trading advisors, and commodity pool operators to file suspicious activity reports.⁴⁹ By October 26, 2002, the Secretary, the FRB, and the SEC were required to report to Congress on the application of suspicious activity reporting requirements to registered investment companies and hedge funds.⁵⁰

Section 359 also extends suspicious activity reporting to money transmitters, defined to include persons who transfer funds through an "informal value system" outside of the conventional financial institutions system. The Secretary was required to report to Congress within one year on the need for legislation relating to "informal value transfer banking systems" (for example, the so-called "hawala") and whether the threshold for filing suspicious activity reports should be lowered in the case of such systems.⁵¹

IX. 120-Hour Rule and Anti-Money Laundering Programs

Addressing the government's need for real-time information, section 319 of the Act requires, as of December 25, 2001, domestic financial institutions (including U.S. branches and agencies of foreign banks) to provide information and account documentation for accounts opened, maintained, or administered in the United States within 120 hours, that is, five calendar, not business, days after receiving a request from a federal banking regulator relating to the financial institution's anti-money laundering compliance.

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48. On July 1, 2002, FinCEN published in the Federal Register its final rule implementing §356 of the USA Patriot Act. See 67 Fed. Reg. 44,048 (July 1, 2002). In this regard, the United States is conforming its requirements to international standards because many foreign countries already have broader anti-money laundering rules for securities firms. For example, 24 of the 26 FATF member countries reported having in place most of the key FATF recommendations that apply to stockbrokers, i.e. identifying and keeping records on customer identity, monitoring unusually large transactions that have no apparent economic purpose, and reporting suspicious activities to authorities. See *Annual Report 2000-2001*, *supra* note 2, annex D.
 49. Entities that are subsidiaries of bank holding companies and foreign banks with U.S. branches and agencies are already subject to suspicious activity reporting requirements. See 12 C.F.R. §225.4(f).
 50. By October 26, 2002, the Secretary was also required to conduct a study of possibly expanding the current BSA currency transaction reporting exemptions currently available to financial institutions and of methods to improve utilization of exemptions to reduce the filing of reports that have little or no value to law enforcement. See USA Patriot Act, §366(b). On August 30, 2002, the Department of the Treasury released a report entitled "Survey on Costs of Filing Currency Transaction Reports (CTRs) and Suspicious Activity Reports (SARs) and the Use of the Exemption Process."
 51. On November 22, 2002, the Department of the Treasury released a report entitled "A Report to the Congress in Accordance with Section 359 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001."
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Section 352 of the USA Patriot Act also required domestic financial institutions to develop anti-money laundering programs by April 24, 2002⁵² that include at a minimum (i) the development of internal policies, procedures, and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test programs. Under applicable regulations and supervisory policies, U.S. banks and U.S. branches and agencies of foreign banks are already required to have anti-money laundering programs in place. However, these requirements will apply for the first time to securities broker-dealers and other non-bank financial institutions. The securities industry expressed concerns that it would be required to meet a "one-size-fits-all" compliance program.⁵³ Securities broker-dealers and investment management groups maintain that they are not as vulnerable as banks to money laundering, mainly because securities activities generally do not involve cash.⁵⁴ Section 352 addressed these concerns and authorizes the Secretary to develop regulations governing anti-money laundering programs that take into consideration the size, location, and activities of the financial institution.

The USA Patriot Act also makes a financial institution's record in anti-money laundering compliance a factor when federal banking regulators consider merger and other bank applications. Section 327 of the Act requires the FRB, with respect to any application under section 3 of the Bank Holding Company Act (BHCA), and any federal banking regulator, with respect to any merger application submitted under section 18(c) of the Federal Deposit Insurance Act, after December 31, 2001, to take into consideration the effectiveness of the applicant in combating money laundering activities, including in overseas branches. The FRB already carefully reviews money laundering issues in applications by foreign banks under section 3 of the BHCA and section 7 of the IBA.

52. On April 29, 2002, the Department of the Treasury published in the Federal Register interim final rules implementing section 352 of the USA Patriot Act, by requiring that anti-money laundering programs be established by (i) certain financial institutions that are regulated by a federal functional regulator, such as U.S. insured banks, U.S. branches and agencies of foreign banks, brokers or dealers in securities that are registered, or required to be registered, with the SEC, and commodity futures merchants and introducing brokers that are registered, or required to be registered, with the CFTC; (ii) mutual funds; (iii) credit card system operators; and (iv) money service businesses. 67 Fed. Reg. 21,109, 21,114, 21,117, and 21,121 (Apr. 29, 2002). The requirement to establish an anti-money laundering program was deferred with respect to other financial institutions that would otherwise be subject to the requirements imposed by section 352. Financial institutions regulated by a federal functional regulator, or through their respective self-regulatory organization, are deemed to be in compliance with section 352 of the Act, if they establish and maintain anti-money laundering programs that are already required by existing applicable regulations and supervisory policies. *See id.* On September 26, 2002, the Department of the Treasury released proposed rules that would, when adopted as final rules, require insurance companies and certain unregistered investment companies to establish anti-money laundering programs. 67 Fed. Reg. 60,617 and 60,625 (Sept. 26, 2002).

53. 147 CONG. REC. S11,041 (daily ed. Oct. 25, 2001) (statement of Sen. Paul Sarbanes (D-MD)).

54. *See, e.g.,* United States General Accounting Office, *supra* note 47, at 11.

X. Information Sharing

Under the USA Patriot Act, financial institutions are allowed to participate in information-sharing arrangements with governmental authorities and with each other concerning terrorist and money laundering activity. Section 314 of the Act required the Secretary to adopt regulations by February 23, 2002 to encourage information sharing by regulators and law enforcement authorities with financial institutions concerning parties reasonably suspected of engaging in terrorist acts or money laundering activities.⁵⁵ Section 314 also allows financial institutions and any association of financial institutions, upon notice to the Secretary, to share information regarding individuals, entities, organizations, and countries suspected of possible terrorist or money laundering activities.

Section 314 provides that any information-sharing arrangement complying with section 314 and any regulations issued under this section will not subject any financial institution or other person to liability under any federal or state law or regulation, or under any contract or other legally enforceable agreement to a person who is the subject of the information sharing. The provision also provides that information sharing will not constitute a violation of the privacy provisions of the Gramm-Leach-Bliley-Act, which usually requires that financial institutions notify consumers before disclosing any non-public personal information to non-affiliated third parties.⁵⁶

Section 355 of the USA Patriot Act further permits insured depository institutions and U.S. branches and agencies of foreign banks to provide information, such as a written employment reference concerning participation of former bank officers and employees in possible unlawful activity, in response to a request for an employment reference from another U.S.-insured depository institution or U.S. branch or agency of a foreign bank. The employment reference must relate to a current or former institution-affiliated party. This safe harbor provision expressly overrides any other provision of U.S. law; however, the general prohibition against disclosing the fact of the submission of a suspicious activity report concerning a particular action or transaction continues to apply. There is no protection from liability if the information is provided with malicious intent.

Existing law provides a safe harbor under which any financial institution (or any director, officer, employee, or agent of such financial institution) that files a suspicious activity report with a government agency of any possible violation of law or regulation is protected from liability to any person identified in the disclosure. Section 351 of the USA Patriot Act clarifies the existing safe harbor provisions, that is, it does not provide immunity from a government action.

55. On September 26, 2002, the Department of the Treasury published in the Federal Register a final rule pursuant to section 314 of the USA Patriot Act that facilitates information sharing among financial institutions and between financial institutions, and associations of financial institutions, on the one hand, and federal law enforcement agencies on the other hand. 67 Fed. Reg. 60,579 (Sept. 26, 2002). The final rule implements, in substantial part, a rule that was proposed by the Department of the Treasury on March 4, 2002. 67 Fed. Reg. 9879 (Mar. 4, 2002).

56. See 15 U.S.C. §§6801-6827 (2001).

XI. Special Measures

The USA Patriot Act provides the Secretary with broad discretionary authority to take certain measures tailored to the particular money laundering problems presented by specific foreign jurisdictions, financial institutions operating outside the United States, and classes of international transactions. These provisions were originally sponsored by the Clinton Administration, and were included in bills introduced by Senator John Kerry (D-MA) and Representative John LaFalce (D-NY).⁵⁷

As previously noted, section 311 of the USA Patriot Act authorizes the Secretary (i) to determine that a foreign jurisdiction, a foreign financial institution, or a class of transactions is of "primary money laundering concern," and (ii) to impose "special measures" on domestic financial institutions, including the U.S. branches and agencies of foreign banks, when they are involved with such a foreign jurisdiction, foreign financial institution, or class of transaction. In order to determine that reasonable grounds exist for concluding that a foreign jurisdiction, a foreign financial institution, or a class of transactions is of "primary money laundering concern," the Secretary must consult with the Secretary of State and the Attorney General. In making such a determination, the Secretary is required to consider (i) evidence that organized criminal groups or international terrorists have transacted business in a particular jurisdiction; (ii) the extent to which a jurisdiction, or financial institutions operating in a jurisdiction, offer bank secrecy or special regulatory advantages to non-residents of the jurisdiction;⁵⁸ (iii) the substance and quality of administration of the bank supervisory and anti-money laundering laws of a jurisdiction; (iv) the relationship between the volume of financial transactions occurring in a jurisdiction and the size of the economy of the jurisdiction; (v) the extent to which a jurisdiction is characterized as an offshore banking or secrecy haven by "credible international organizations" or multilateral expert groups; (vi) whether the United States has a Mutual Legal Assistance Treaty with a jurisdiction, and the experience of U.S. law enforcement and regulatory officials in obtaining information about transactions involving the jurisdiction; and (vii) the extent to which a jurisdiction is characterized by high levels of official or institutional corruption.

After such a determination has been made, the Secretary may impose the "special measures" by regulation, order, or as otherwise permitted by law.⁵⁹ If a special measure is imposed by order, it must be issued together with a notice of the proposed rulemaking requesting public comment relating to the imposition of the special measure. Such orders may not remain in effect for longer than 120 days unless a rule is promulgated on or before the end of the 120-day period beginning on the date of issuance of the order. Once a foreign jurisdiction, a foreign financial institution, or a class of transactions has been determined to be a primary money laundering concern, the Secretary must conduct an

57. See International Counter-Money Laundering and Foreign Anticorruption Act of 2001, H.R. 1114, 106th Cong. (2001).

58. Unlike earlier proposals, the USA Patriot Act does not contain any references to tax havens in this context. See USA Patriot Act §311.

59. In selecting which special measure to take, the Secretary must consult with the FRB, other appropriate federal banking agencies, the Secretary of State, the SEC, the CFTC and the National Credit Union Administration. See USA Patriot Act §311(a).

additional multi-factored cost-benefit analysis before imposing any special measures.⁶⁰ The special measures could include:

- *Additional Recordkeeping and Reporting Requirements.* Domestic financial institutions may be required to maintain records or reports that identify the participants in transactions, identify the beneficial owner of the funds involved, and describe the transactions.
- *Identifying Beneficial Ownership of Accounts Held by Foreign Persons.* Domestic financial institutions may be required to take such steps as the Secretary deems to be "reasonable and practicable" to obtain information concerning the beneficial ownership of any U.S. account opened by a foreign person or representative of a foreign person.
- *Collecting Information Relating to Payable Through and Correspondent Accounts.* Domestic financial institutions may be required to identify the customers who use these accounts and obtain information concerning them that is substantially comparable to that which is obtained in the ordinary course of business with respect to U.S. customers.
- *Prohibiting the Establishment or Maintenance of Payable Through or Correspondent Accounts.* The Secretary may completely prohibit or impose certain conditions on a domestic financial institution opening or maintaining any correspondent or payable-through account that involves any designated jurisdiction, financial institution, or class of transactions.

XII. New Predicate Offenses for Money Laundering

Section 315 of the USA Patriot Act expands the list of predicate offenses for criminal money laundering violations to include offenses against a foreign country involving (i) murder, kidnapping, robbery, extortion or destruction of property by means of a crime of violence; (ii) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official; (iii) smuggling or export control violations involving an item listed on the United States Munitions List or controlled

60. The factors the Secretary must consider prior to imposing a "special measure" include (i) whether similar action has been, or is being taken by, other nations or multilateral groups; (ii) whether the imposition of any special measure would create significant competitive disadvantage, including undue cost or burden, for domestic financial institutions (including U.S. branches and agencies of foreign banks); (iii) the extent to which the action or timing of the action would have a significant adverse impact on the international payment, clearance, and settlement systems, or on legitimate business activities involving the particular jurisdiction, institution, or class of transactions; and (iv) the effect of the action on U.S. national security and foreign policy. In deciding to apply any of the special measures to a foreign financial institution or a class of transactions, the Secretary is also required to consider (i) the extent to which the financial institution or class of transactions are used to facilitate or promote money laundering; (ii) the extent to which those institutions or transactions are used for legitimate business purposes in the jurisdiction; and (iii) the extent to which the action is sufficient to ensure deterrence against international money laundering and other financial crimes. *Id.*

under the Export Administration Regulations; and (iv) any offense for which the United States would be obligated by a multilateral treaty to extradite the alleged offender. In addition, any felony violation of the Foreign Agents Registration Act and various other crimes related to falsely classified goods, unlawful importation and trafficking of firearms, and computer fraud and abuse are considered predicate offenses for money laundering. Section 376 of the USA Patriot Act also includes providing material support or resources to foreign terrorist organizations as a predicate offense.

XIII. Extraterritorial Jurisdiction

Depending on how they are applied in practice, the special measures and the record-keeping and forfeiture provisions of section 319 discussed above may have an extraterritorial impact on non-U.S. financial institutions or persons. In addition, section 317 of the USA Patriot Act specifically contains provisions establishing "long-arm" jurisdiction over foreign money launderers if service of process is made and:

- the person commits an offense involving a financial transaction that occurs in whole, or in part, in the United States; or
- the foreign person converts property in which the United States has an ownership interest by virtue of a forfeiture; or
- the foreign person is a financial institution that maintains a bank account at a U.S. financial institution.

Thus, maintaining a single U.S. bank account would be sufficient under section 317 provision to confer jurisdiction for U.S. money laundering prosecutions over a foreign bank with no U.S. operations. Section 377 also provides extraterritorial jurisdiction over financial crimes involving credit cards or other access devices issued in the United States, if the offense has certain contacts with the United States.

The USA Patriot Act also facilitates the enforcement of foreign judgements. Section 323 allows the federal government to apply for a restraining order to ensure the availability of funds or property to satisfy the foreign forfeiture or confiscation judgement. In issuing the order, a court may rely on information provided in an affidavit describing the nature of the foreign proceeding, and setting forth a "reasonable basis" to believe that the property to be restrained will be named in the judgement of forfeiture. The court may also register and enforce a restraining order issued by a foreign court of competent jurisdiction and certified by the Attorney General.⁶¹

61. Other provisions in the Act that are not expressly discussed in this article include (i) creating a new crime of "bulk cash smuggling," (i.e., concealing and transporting more than \$10,000 knowing that the funds were derived from some form of illegal activity); (ii) raising the level of civil money penalties and criminal fines for violating the reporting and record-keeping provisions of the BSA; (iii) expanding the definition of "financial institution" for the criminal money laundering statute to include a "foreign bank," which means that certain money laundering activities that take place through a foreign bank will now be considered money laundering crimes in the United States; (iv) international cooperation on identification of originators of wire transfers; (v) amendments to the Right to Financial Privacy Act (the RFPFA) to permit intra-governmental sharing of information gathered under the

XIV. Conclusion

The USA Patriot Act will have a significant impact on the operations of U.S. banks and the relationship that U.S. banks have with foreign customers. It also will impose new anti-money laundering duties on securities firms and other non-bank financial institutions, in particular, requirements to file suspicious activity reports. It will take some time before all implications of the Act are completely understood, including the extent to which in practice it will be applied extraterritorially.

RFPA for intelligence or counterintelligence activities; and (vi) amendments to the Fair Credit Reporting Act to allow credit reporting agencies to furnish the consumer's credit report a government agency. See USA Patriot Act §§301-377.
